



1 In the instant motion, Hesler argues that the alleged conduct does not comprise a constitutional  
2 violation under the Eighth Amendment. Hesler seeks dismissal or, in the alternative, summary judgment.  
3 (Doc. # 81).

## 4 **II. Legal Standards**

5 A court may dismiss a complaint for “failure to state a claim upon which relief can be granted.”  
6 Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short and plain statement of the  
7 claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v.*  
8 *Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it  
9 demands “more than labels and conclusions” or a “formulaic recitation of the elements of a cause of  
10 action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

11 “Factual allegations must be enough to raise a right to relief above the speculative level.”  
12 *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient  
13 factual matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. 662, 678 (citation  
14 omitted).

15 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when  
16 considering motions to dismiss. First, the court must accept as true all well-pled factual allegations in  
17 the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 678-79. Mere  
18 recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.*  
19 at 678.

20 Second, the court must consider whether the factual allegations in the complaint allege a  
21 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint alleges  
22 facts that allow the court to draw a reasonable inference that the defendant is liable for the alleged  
23 misconduct. *Id.* at 678.

24 Where the complaint does not permit the court to infer more than the mere possibility of  
25 misconduct, the complaint has “alleged—but not shown—that the pleader is entitled to relief.” *Id.* (internal  
26 quotations omitted). When the allegations in a complaint have not crossed the line from conceivable to  
27 plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.

1       The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202, 1216  
2 (9th Cir. 2011). The *Starr* court stated, “First, to be entitled to the presumption of truth, allegations in  
3 a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain  
4 sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend  
5 itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an  
6 entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense  
7 of discovery and continued litigation.” *Id.*

### 8       **III. Analysis**

9       As an initial matter, the court acknowledges that plaintiff’s complaint was filed *pro se* and is  
10 therefore held to less stringent standards. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (“A document filed  
11 *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to  
12 less stringent standards than formal pleadings drafted by lawyers.”) (internal quotations and citations  
13 omitted). However, “*pro se* litigants in an ordinary civil case should not be treated more favorably than  
14 parties with attorneys of record.” *Jacobsen v. Filler*, 790 F.2d 1362, 1364 (9th Cir. 1986).

15       The Eighth Amendment prohibits unnecessary and wanton infliction of pain and punishment that  
16 is “so totally without penological justification that it results in the gratuitous infliction of suffering.”  
17 *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). Prisoners have a “limited right to bodily privacy.”  
18 *Michenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988). Specifically, prisoners have an Eighth  
19 Amendment right to be free from sexual abuse. *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir.  
20 2000) (citation omitted).

21       Sexual abuse is “inconsistent with contemporary standards of decency” and “repugnant to the  
22 conscience of mankind,” and therefore, violates the Eighth Amendment. *Whitley v. Albers*, 475 U.S. 312,  
23 327 (1986) (internal citations omitted). Under the deliberate indifference standard, a violation of the  
24 Eighth Amendment is only found when an objective and subjective component are met. *See Farmer v.*  
25 *Brennan*, 511 U.S. 825, 932 (1994); *Labatad v. Corrections Corp. of Am.*, 714 F.3d 1155, 1160 (9th Cir.  
26 2010) (citation omitted).

27       ...

1 “[V]erbal harassment generally does not violate the Eighth Amendment.” *Keenan v. Hall*, 83  
2 F.3d 1083, 1092 (9th Cir. 1987) (citing *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 2004).  
3 Verbal sexual harassment alone is not sufficient to constitute an Eighth Amendment violation. *See*  
4 *Austin v. Terhune*, 367 F.3d 1167, 1172 (9th Cir. 2004).

5 As to count four of his complaint, the only allegation that *pro se* plaintiff makes against Hesler  
6 is that, on July 21, 2012, Hesler told the inmates that he would be checking “dicks because he was the  
7 dick police.” (Doc. # 11, p. 16). Although he denies this allegation, Hesler correctly argues that, even  
8 if it were true, such conduct does not constitute a violation of the Eighth Amendment.

9 Plaintiff, in his opposition, attempts to refute the instant motion by putting forward allegations  
10 that do not appear in his complaint. (Doc. # 87). Plaintiff alleges that Hesler subjected him to “pat  
11 searches” and strip searches. (Doc. # 87, p. 2). However, these additional allegations were not included  
12 in plaintiff’s complaint and therefore do not present a basis upon which the court could deny the motion  
13 to dismiss.

14 Moreover, the grievance forms (“kites”) attached to plaintiff’s opposition are also irrelevant to  
15 the instant claim against Hesler. (*See* doc. # 87, Exhibits 1-6, p. 14-19). These kites make no reference  
16 to the allegations at issue and the sole kite that mentions Hesler, which is dated February 8, 2013, alleges  
17 merely that Hesler “comes to bang on [plaintiff’s] cell window from the outside.” (Doc. # 87, Exhibit  
18 5, p. 18).

19 Taken as true, the allegations as set forth in plaintiff’s amended complaint do not state a plausible  
20 Eighth Amendment claim against Hesler. Therefore, the court will grant the motion to dismiss.

#### 21 **IV. Conclusion**

22 Accordingly,

23 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant Hesler’s motion to  
24 dismiss (doc. # 81), be, and the same hereby is, GRANTED.

25 IT IS FURTHER ORDERED that count four is dismissed as to defendant Hesler.

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1 IT IS FURTHER ORDERED that the clerk shall strike plaintiff's second amended complaint  
2 (doc. # 44) from the docket as it was improperly filed without leave.

3 DATED June 27, 2014.

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6 UNITED STATES DISTRICT JUDGE  
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